Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

(2)

No. 95-1646

In The

Supreme Court of the United States

October Term, 1995

WHARF CABLE LIMITED,

Petitioner,

vs.

UNITED INTERNATIONAL HOLDINGS, INC. and
UIH ASIA INVESTMENT CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JEFFREY A. CHASE
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 17th Street, Suite 1500
Denver, Colorado 80265
(303) 685-4800

DAVID B. WILSON
Counsel of Record
HOLME ROBERTS & OWEN LLC
1700 Lincoln, Suite 4100
Denver, Colorado 80203
(303) 861-7000

Counsel for Respondents

May 12, 1996

4 APP

QUESTION PRESENTED

The Tenth Circuit's unpublished decision, which interprets a particular arbitration clause as not requiring arbitration of the eleven claims remaining in this lawsuit—only *one* of which is against petitioner Wharf Cable—neither suggests a split between the Tenth Circuit and other Courts of Appeal nor raises any important question of law. Rather, after analyzing the language of that arbitration clause and the specific facts of this case, the Tenth Circuit merely recognized that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration . . . ." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. ___, 131 L.Ed. 2d 985, 994, 115 S.Ct. 1920 (1995). Thus, the only question that this case would present if the petition were granted is:

> Whether the Tenth Circuit correctly concluded that it should not "rewrite [the parties' agreement] and its arbitration clause" (App. at 10a), which was drafted to apply only to disputes "between the parties" to "this Agreement," in a manner that would "encompass claims wholly unrelated to [that agreement] and involving parties who did not sign that agreement and were never mentioned in that agreement." (App. at 10a)

LIST OF INTERESTED PARTIES

The petitioner is Wharf Cable Limited.

The respondents are United International Holdings, Inc. and UIH Asia Investment Co. United International Holdings, Inc. is a publicly traded company and has the following non-wholly owned subsidiaries:

A2000 Holding NV, Akersberga Vision AB, Anfel-Kabelkom Cable Communications Ltd., Ballinasloe Electronic Services Ltd., Cable Networks Austria Holdings B.V., Ceska Programova Spolecnost, s.r.o., Citécable Auvergae SA, Citécable Caladois SA, Citécable Centre Bretagne SA, Citécable Essonne SA, Citécable Est SA, Citécable Goussainville SA, Citécable Haute Saône SA, Citécable Jurassienne SA, Citécable Regions SA, Citécable Rhóne Alpes SA, Citécable SA, Citécable Saintagne SA, Citéservices SA, Cork Communications Ltd., Culross Investments Limited, Finvision AB, Hajdu-Kabelkom Cable Communications Ltd., Halmstads Kabelvision AB, Horizon T.V. Distribution Limited, Independent Wireless Cable Limited, Intercabo, Israel Cable Programming, Ltd., Kabel-Fernsehen Hamburg Service Beteiliguns-GmbH, Kabel Net Brno, a.s., Kabel Net Holding, a.s., Kabelkom-Dunaujvaros Cable Communications Ltd., Kabelkom Holding Co., Kabelkom Kabeltelevizio Kft., Kabelkom Management Co., Kabelkom-Nyiregyhaza Cable Communications Ltd., Kabelkom-Pecsi Cable Television Ltd., Kabelkom-Szekesfehervar Cable Communications Ltd., Kabelkom-Szolnok Cable Communications Ltd., Kabelkom-Veszprem Cable Communications Ltd., Kabeltelevisie Amsterdam B.V., Kabeltelevisie Eindhoven N.V., Kabelvision KB, Kanal 2 A/S, Kenniv Securities, Mediaréseaux Marne SA, Melita

Cable Holdings Limited, Melita Cable TV Limited, Melita Partnership, Multicanal Atlantico-Televisao por Cabo, S.A., Multicanal Capital-Televisao por Cabo, S.A., Multicanal Holdings, S.R.L., Multicanal Norte-Televisao por Cabo, S.A., Multicanal Sul-Televisao por Cabo, S.A., Multicanal-Televisao por Cabo, CDA, Multicanal-Televisao por Cabo, LDA, Norkabel A/S (F/K/A Rogaland Kabelnett AS), Norkabelgruppen A/S, Oslo Kabelanlegg A/S, Princes Holdings Limited, RKS Kabel-Fernsehen Hamburg Service Gmbh & Co. KG, Radio Public N.V./S.A., Santander de Cable S.A., SCD Finans AB, SCD Holding AB, SCD Invest AB, She Service—Heset Elektronic AB, Swedish Cable and Dish AB, T.V. Sparts Limited, Telekabel Fernsehnetz Graz Betriebsgesellschaft mbh, Telekabel Fernsehnetz Klagenfurt Betriebsgesellschaft mbh, Telekabel Fernsehnetz Region Baden Betriebsgesellschaft mbh, Telekabel Fernsehnetz Wiener Neustadt/Neukirchen Betriebsgesellschaft mbh, Telekabel Wien Aktien Gesellschaft, Telestar-Kabelkom Cable Communications Ltd., Tevel Israel International Communications, Ltd., Tishdoret Achzakot, Ltd., Trnavatel s.r.o., UCI Enterprises, Inc. (formerly known as UCI Management, Inc.), UCT Netherlands, B.V., UIH Bulgaria, Inc., UIH Central and East European Investments, Ltd., UIH Iberia S.L., UIH Portugal, Inc., UIH Romania, Inc., UIH Romania Ventures, Inc., UIH Slovakia, Inc., UIH Spain, Inc., UIH Turkey, Inc., UII-Ireland Limited Liability Company, UII-Ireland Ltd., UII Management, United and Phillips Communication B.V., United Communications International, United International Investments, Urbecable S.A., Westward Cable Limited, Westward Horizon Limited, Cablevision Norte SA (CVN), Cablevision S.A., Cabodinamica-TV Cabo Sao Paulo S.A., CTV Pty Ltd., Cuernamu, S.A. DE C.V., Century United Programming Venture Pty, Ltd., DSTV Distribuidora de Sinais de Televisao S.A., Hunan

International Telecommunications Company Limited, Ibercom, Inc., Interactive Television Network, Inc., Investnews S.A., Jundiai TV Cabo, S.A., Mega Cable Deal, Megacomm M. Servicios, S.A. de C.V., Monor Communications Group, Inc., Monor Telefon Tarasag Rt., Multicanal TPS, S.A. (f/k/a Telki S.A. Compañia), Nidlo B.V., Red de Television y Servicios Por Cable S.A. (f/k/a STX), RPA Leasing, Inc., RTS (US), Inc., Satellite Telecommunications and Information Systems, Saturn, Societe Francaise des Communications et du Cable S.A., Spanish Program Services, C.V., STV PTY LIMITED (''STV''), Telecable de Chilpancingo, S.A. de C.V., Telecable de Morelos, S.A. de C.V., Telecable Mexicano, S.A. de C.V., Telefenua S.A., TV Show Brasil, S.A., U.D.P. Management Limited, UIH Asia Investment Co., UIH Asia, Ltd., UIH do Brasil Tecnologia Ltda., UIH El Salvador, Inc., UIH-GTS, Inc. (fka UIH Guadeloupe, Inc.), UIH Peru, S.A., UIH-SFCC L.P., and XYZ Entertainment Pty Limited.

UIH Asia Investment Co. is owned by United International Properties, Inc., Noble Investment Company and Newton Investment Company, but has no subsidiary that is not wholly-owned.

David B. Wilson of Holme Roberts & Owen LLC is counsel of record for respondents. Jeffrey A. Chase of Jacobs Chase Frick Kleinkopf & Kelley, LLC is also counsel for respondents, as are John R. Webb, Daniel P. Maguire and Matthew J. Rita of Holme Roberts & Owen LLC.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
A. THE PARTICULAR ARBITRATION CLAUSE THAT THE TENTH CIRCUIT INTERPRETED	2
B. THE PARTIES AND THEIR DISPUTE	3
C. THE FACTUAL UNDERPINNINGS OF PLAINTIFFS' CLAIMS: HOLDINGS' AND WCIL'S SCHEME TO DEFRAUD PLAINTIFFS	5
1. UIHI's business and the purpose of its contacts with Holdings	5
2. Holdings defrauds UIHI into lending CATV expertise *before* the award of the Franchise license to Cable	6
3. The parties discuss but reject "activating" the TCA	12
4. Holdings and WCIL refuse to permit UIHI to exercise its option to invest in CNCL	13

Contents

Page

D. CORRECTION OF MISSTATEMENTS IN THE PETITION. 14

REASONS FOR DENYING THE PETITION 16

A. THE TENTH CIRCUIT'S DECISION DOES NOT SUGGEST ANY "SPLIT" AMONG THE CIRCUITS CONCERNING ARBITRATION OF CLAIMS INVOLVING NONSIGNATORIES TO AN ARBITRATION AGREEMENT..... 16

B. BASED ON ANALYSIS OF THE *FACTS* UNDERLYING PLAINTIFFS' CLAIMS—*NOT* THE SUBSTANTIVE LEGAL THEORIES—THE TENTH CIRCUIT CORRECTLY CONCLUDED THAT THIS DISPUTE LACKS THE "REQUISITE FACTUAL CONNECTION TO THE [TCA]." 21

CONCLUSION 24

APPENDIX 1a

TABLE OF AUTHORITIES

ARW Exploration Corp. v. Aguirre, 45 F.3d 1455 (10th Cir. 1995) 19

Armijo v. Prudential Ins. Co., 72 F.3d 793 (10th Cir. 1995) 17

Authorities

	Page
Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990)	20
AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986)	17
First Options of Chicago, Inc. v. Kaplan, 514 U.S. ___, 131 L.Ed. 2d 985, 115 S. Ct. 1920 (1995)	i
Flink v. Carlson, 856 F.2d 44 (8th Cir. 1988)	19
In re Oil Spill by Amoco Cadiz, 659 F.2d 789 (7th Cir. 1981)	20
J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988)	20
McPheeters v. McGinn, Smith & Co., 953 F.2d 771 (2d Cir. 1992)	19
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)	2, 18, 20, 22
Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 795 F.2d 1111 (1st Cir. 1986)	19
O'Connor v. R.F. Lafferty & Co., 965 F.2d 893 (10th Cir. 1992)	17
Sam Reisfeld & Son Import Motor Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976)	20

Contents

Page

Taylor v. Investors Assoc., Inc., 29 F.3d 211 (5th Cir. 1994) 19

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 18, 24

No. 95-1646

In The

Supreme Court of the United States

October Term, 1995

WHARF CABLE LIMITED,

Petitioner,

v.

UNITED INTERNATIONAL HOLDINGS, INC. and
UIH ASIA INVESTMENT CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents United International Holdings, Inc. (''UIHI'') and UIH Asia Investment Co. (''UIH Asia'') (collectively, ''Plaintiffs'') respectfully request that the Court deny Wharf Cable Limited's (''Cable'') petition for writ of certiorari, which seeks review of the Tenth Circuit's unpublished ''order and judgment'' affirming the District Court's denial of Cable's motion to compel arbitration.

STATEMENT OF THE CASE

A court's power to compel arbitration of a particular dispute hinges on whether the parties agreed to arbitrate that

dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). As the following discussion of the arbitration clause on which Cable relies and the factual allegations underlying the disputes in this case demonstrates, Cable lost in the Tenth Circuit and in the District Court because the parties' agreement cannot be "stretch[ed]" (App.[1] at 8a) to shoehorn those specific disputes into the limited scope of that particular arbitration clause. Cable's repeated invocation of arbitration "policy" cannot substitute for the two things that Cable would have needed to compel arbitration: a *different* arbitration clause and *different* facts.

A. The Particular Arbitration Clause that the Tenth Circuit Interpreted.

The starting point of the Tenth Circuit's analysis was the arbitration clause on which Cable based its motion to compel arbitration—clause 13 of the September 25, 1992 document entitled, "Technical Cooperation Agreement" ("TCA"):

> 13.1 If any dispute, controversy or difference arises *between the parties* out of, or in relation to, *this Agreement* or for breach thereof, *the parties* shall first attempt in good faith to resolve amicably such dispute, controversy or difference.
>
> 13.2 If such attempt is unsuccessful, such dispute, controversy or difference shall be resolved by arbitration [*sic*] or any other place agreed upon *by the parties*. Notwithstanding the first sentence, any disputes arising from, or in connection with *this Agreement* shall be arbitrated in Hong Kong. Such arbitration shall be conducted in accordance with the Rules of Conciliation of the International Chamber of Commerce. . . .

---

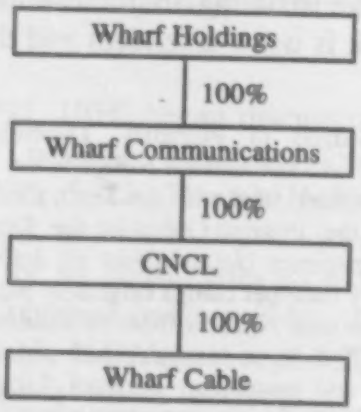
1. All citations to the Appendix to this brief are presented in this form.

(App. at 3a-4a) (emphasis added). Thus, under this arbitration clause, only a dispute that is (1) "between the parties" to the TCA *and* (2) that "arises . . . out of," or "from," or is "in relation to" or "in connection with" the TCA could be arbitrated. The *only* "parties" to the TCA are Cable and UIHI. 10th Cir. App. at 49, 61.[2] The other persons before the District Court—UIH Asia, The Wharf (Holdings) Limited ("Holdings"), Wharf Communications Investments Limited ("WCIL") and Stephen Ng ("Ng")—are *not* parties to the TCA.

B. The Parties and Their Dispute.

Although ignored in Cable's petition, this case is primarily against Holdings and WCIL. No dispute exists that these entities are not even mentioned in the TCA, never agreed to arbitrate *any* dispute with UIHI or UIH Asia, never moved to compel arbitration, and were *not* parties to the appeal on which Cable's petition is based.

The relationship among Holdings, WCIL and Cable is:



Id. at 343, ¶ 9.

[2] All citations to the "appellant's appendix," which comprised the record before the Tenth Circuit, are in this form.

Holdings and WCIL are defendants to each of Plaintiffs' remaining eleven claims for relief.[3] As explained at pp. 5-13 below, they are the entities who defrauded UIHI in connection with its purchase of an option to acquire an equity interest in WCIL's wholly-owned subsidiary, Cable Network Communications Limited ("CNCL"); violated federal and Colorado securities laws; and breached their contract with UIHI when they refused to permit UIHI to exercise the option and invest in CNCL. On each of these claims, Holdings and WCIL are alleged to be liable for their *own* misconduct (e.g., fraud in connection with their sale of a security; breaching the contract). Plaintiffs do *not* claim that Holdings or WCIL are derivatively liable for any misconduct of Cable.[4]

By contrast, third-tier subsidiary Cable is a party to *only one* claim: unjust enrichment, which is brought in the alternative to the breach of contract claim against Holdings and WCIL. (App. at 5a) Yet, *only* Cable moved to compel arbitration and *only* Cable appealed the District Court's denial of that motion. 10th Cir. App. at 36 (motion) and 568 (notice of appeal). Cable never provided any evidence demonstrating how it could have standing to force arbitration of the ten claims to which it is not a defendant and thus has no interest in the outcome.[5]

---

3. As acknowledged in Plaintiffs' December 1, 1995 Motion Requesting the Court to Take Judicial Notice of the Withdrawal of Certain Claims Against Appellant, filed with the Tenth Circuit in connection with the preparation of the Pretrial Order in the District Court, Plaintiffs withdrew a civil conspiracy claim against all defendants, as well as the fraud and promissory estoppel claims originally pleaded against Cable.

4. Plaintiffs also sued Ng, an officer of Holdings, WCIL, CNCL and Cable (*id.* at 343, ¶¶ 8-9), in his individual capacity, for securities and common law fraud and promissory estoppel. Like Holdings and WCIL, Ng is alleged to be liable for his own misconduct.

5. Although the unusual procedural posture of Cable's motion to compel and appeal was not a basis for the Tenth Circuit's decision, these circumstances further illustrate how this case presents unique facts that weigh against review on certiorari.

C. The Factual Underpinnings of Plaintiffs' Claims: Holdings' and WCIL's Scheme to Defraud Plaintiffs.

1. UIHI's business and the purpose of its contacts with Holdings.

Contrary to the petition (p. 14), this case is *not* about "how UIHI is to be compensated for its technical services" or the TCA. Rather, as explained below, the events supporting Plaintiffs' claims began in 1991—over a year before the TCA was even drafted—and center on the systematic efforts of Holdings and WCIL to defraud Plaintiffs, which did not cease until 1994.

UIHI's business is acquiring ownership interests in and managing international cable television ("CATV") systems. *Id.* at 342, ¶¶ 2, 5; 345-46, ¶ 20. UIHI does not consult for a fee. *Id.* at 346, ¶ 21. Rather, UIHI lends its unique expertise in international CATV *only* to cable projects in which it is an investor or in which it owns the right to invest. *Id.* at 345-46, ¶¶ 20-21. As spelled out below, this fact is key to understanding how Holdings and WCIL accomplished their fraud.

In spring 1991, UIHI began discussions with Holdings concerning their possible joint development of CATV services. *Id.* at 346, ¶ 22. Though Holdings then had no CATV expertise (*id.* at 345, ¶ 19), it nonetheless desired to bid or cause one of its subsidiaries to bid for a license to operate a CATV franchise in Hong Kong (the "Franchise"). *Id.* at 345, ¶¶ 18-19. Holdings recognized that this lack of expertise presented a major obstacle to its winning the Franchise. *Id.* at 345, ¶ 19.

From their first meeting onward, UIHI made clear to Holdings that UIHI's business is investing, not consulting. *Id.*

at 346, ¶ 23. Thus, UIHI was willing to lend its expertise *only if UIHI acquired the right to invest in the Franchise. Id.* Consistent with UIHI's objective of becoming an investor, from summer 1991 to spring 1992, UIHI and Holdings discussed a joint venture under which UIHI would provide Holdings with CATV expertise, in exchange for the option to purchase an equity interest in the Franchise, which was to be called "Wharf Cable." *Id.* at 346-47, ¶¶ 24-27.

2. Holdings defrauds UIHI into lending CATV expertise *before* the award of the Franchise license to Cable.

As the Tenth Circuit noted, although Cable's petition is based on the September 25, 1992 TCA, the fraud giving rise to Plaintiffs' claims began months *before* the TCA was even drafted, and continued long thereafter. (App. at 8a) Fully aware of UIHI's insistence on acquiring an ownership interest, Holdings and WCIL baited UIHI into lending its expertise through false promises of the right to invest that UIHI had been seeking from the outset. 10th Cir. App. at 342, ¶ 3. They used these promises as a lure to keep UIHI on board, milked the expertise needed to launch the Franchise, and then, once they thought they needed no further help, reneged on all promises and discarded UIHI like a piece of old clothing. *Id.*

According to the TCA, the *earliest* UIHI could have been obligated to assist Cable was June 1993, the date of the Hong Kong government's award of the franchise license to Cable. *Id.* at 50, ¶ 2; 356, ¶ 63. By contrast, the focus of Plaintiffs' claims is how UIHI was conned into lending its expertise *before* license award, beginning in the summer of 1992.

By June 1992, Holdings had concluded that it could win the Franchise by showing the Hong Kong government (the

"Government") that UIHI would supply the CATV expertise which Holdings lacked. *Id.* at 347, ¶ 28. To further this strategy, beginning in June 1992 Ng made false representations of fact to UIHI concerning Holdings' intention to allow UIHI to purchase an equity interest in the cable project. *Id.* at 347-48, ¶¶ 29, 31. When Ng made these misrepresentations, he either knew that UIHI would not be permitted to invest, or he was, at best, recklessly indifferent to that fact. *Id.* at 364, ¶¶ 122-123.

Through these misrepresentations, Holdings and WCIL intended to induce UIHI to provide the expertise that they needed to win the Franchise. *Id.* at 360, ¶ 95; 364, ¶ 124. In reliance on these misrepresentations, and with the specific understanding that it would be an investor and that the parties soon would enter into a written agreement regarding UIHI's investment rights, UIHI, at its own expense, began to assist Holdings and WCIL. *Id.* at 348, ¶¶ 30-31. UIHI personnel helped draft the Franchise application and revise Cable's business plan, and provided other expertise necessary to meet the application deadline. *Id.*

As a result of UIHI's efforts, Cable met the September 30, 1992 deadline for the Franchise application. *Id.* at 350, ¶ 43. However, while Ng had promised and UIHI had understood that a binding agreement under which UIHI would have the right to purchase an equity interest in the Franchise would be documented, this did not occur. *Id.* at 348-50, ¶¶ 33-39.

Contrary to UIHI's expectations and Ng's promises, Wharf proposed that the parties sign a "nonbinding" agreement concerning UIHI's investment rights. *Id.* at 349, ¶ 36. Because UIHI already had begun to commit its personnel to the project, a nonbinding agreement was unacceptable to UIHI. *Id.*

UIHI's demands created a dilemma for Holdings and WCIL. They realized that if Cable were to win the Franchise, they still needed UIHI's help. *Id.* at 350, ¶ 40. Without the right to invest, however, UIHI was unwilling to provide that help. *Id.*

Therefore, as an alternative to the "nonbinding" agreement discussed above and falling back on the structure the parties had discussed previously, Ng stated that UIHI would be granted an option, giving it the right to purchase a 10 percent interest in WCIL's subsidiary (and Cable's parent), *CNCL*, in exchange for which UIHI would continue to lend its expertise. *Id.* at 350, ¶ 41. At about the same time, the parties agreed that UIHI could, if it desired, use its affiliate, UIH Asia, to hold the equity interest in CNCL. *Id.* at 350, ¶ 42. Holdings and WCIL thus induced UIHI to permit its name to be used in the Franchise application. *Id.* at 351, ¶ 44.

According to Ng, to show the Government that the Wharf group of companies had a relationship with UIHI and access to UIHI's expertise, the plan originally had been to submit with the application a written agreement with UIHI under which UIHI would invest in the Franchise upon license award. *Id.* at 247-48, Schneider Affid. ¶ 2. After it became clear that documentation of an agreement concerning UIHI's investment rights would not be completed before the application deadline, Cable and UIHI signed the TCA as a stop-gap measure designed solely to facilitate the application. *Id.* at 248, ¶¶ 2-3. Both before and after the TCA's execution, Ng acknowledged and agreed that the TCA that UIHI executed would never become operative and that the basis for UIHI's continued willingness to help with the Franchise would continue to be the right to acquire at least a 10 percent interest in CNCL. *Id.* at 351, ¶ 46.

As Ng assured UIHI, the TCA—which *only* Cable and UIHI signed—was for the application *only*, and was *not* intended to substitute for an agreement on UIHI's right to invest. *Id.* at 248, Schneider Affid. ¶ 4. Consistent with these discussions, the TCA lacks a standard integration clause that purports to merge all other agreements and to negate prior or contemporaneous promises or representations.[6] Negotiations regarding UIHI's right to invest in CNCL soon resumed. (*See* pp. 10-11 below.)

The TCA *only* addressed services to be provided *after* award of the franchise license to Cable. *Id.* at 50, TCA cl. 2. Indeed, most provisions of the TCA were "conditional" upon the award of the license. *Id.* By contrast, the TCA did *not* refer to any services that might be performed after the TCA was signed, but *before* license award.[7]

Because its application was the only one submitted, Cable was likely to win the Franchise license. *Id.* at 351, ¶ 47. As of fall 1992, license award was anticipated as early as January 1993. *Id.* at 351, ¶ 48. The licensee would be required to begin its cable service within approximately six months after license award. *Id.* However, when it applied for the Franchise, Cable essentially existed only on paper. *Id.* at 352, ¶ 49. Huge amounts of work would have to be

---

[6] By contrast, a shareholders' agreement (10th Cir. App. at 419-70), which the same attorneys for Wharf drafted a short time later, states:

> This Agreement supersedes and invalidates all commitments, representations, warranties and other agreements relating to the subject matter hereof which may have been made by the Shareholders either orally or in writing prior to or contemporaneously with the date hereof . . . .

Id. at 466, ¶ 22.07.

[7] Likewise, the TCA did *not* mention compensation for the services that UIHI had performed *before* the TCA was signed.

completed in a short time if Cable were to have any hope of launching its service within the deadline. *Id.*

Recognizing the continued need for UIHI's help (*id.* at 352, ¶ 50), Ng met with UIHI in Denver, Colorado, in early October 1992. *Id.* at 352, ¶ 51. During these meetings, Ng asked UIHI to send its personnel to Hong Kong to manage the cable project's day-to-day operations, to complete the revision of the project business plan, to identify and recruit permanent staff, and to provide other assistance. *Id.*

Because the TCA only concerned services *after* license award, the TCA did *not* provide any basis for Ng to request this additional, *immediate* assistance from UIHI. Thus, to procure additional help from UIHI in the short term, Ng had to find some *other* basis to convince UIHI to provide that help. And he did.

In reply to Ng's requests for additional, immediate assistance, UIHI's CEO William Elsner and president Mark Schneider told Ng that absent confirmation of the right of UIHI or UIH Asia to invest in CNCL, UIHI was unwilling to provide any more services. *Id.* at 352, ¶ 52. Based on Ng's prior promises that a written investment agreement would be concluded by the date of the Franchise application, UIHI had spent substantial amounts of time and money to assist Wharf. *Id.* Given the magnitude of the assistance Ng was now seeking, without a firm right to invest, UIHI could not afford to incur the additional expense necessary to provide that assistance or to continue to take its personnel away from their pursuit of other business. *Id.* at 353, ¶ 53.

Once again, Ng was willing to make whatever promises were necessary to get UIHI's help. On October 8, 1992, acting on behalf of Holdings and WCIL and for their benefit

as well as Cable's, Ng entered into an oral contract with Schneider and Elsner, on behalf of UIHI. *Id.* at 353, ¶ 54. Under this contract, UIHI had the option for either it or UIH Asia to purchase a 10 percent equity interest in CNCL on certain basic terms, and in exchange for the option, UIHI would continue to lend its expertise in connection with the Franchise. *Id.*

The parties intended their agreement to be binding. *Id.* at 353, ¶ 55. They also contemplated that they would negotiate and document *additional* terms under which UIHI would agree to exercise its option and invest in CNCL. *Id.* However, with the option agreement in place, UIHI had the assurance it would be able to invest, even if the parties never reached any further agreement. *Id.* at 353-54, ¶ 55.

Following the October 1992 agreement, and continuing for months thereafter, Ng reaffirmed UIHI's investment rights in meetings and telephone conversations with at least eight different UIHI or UIH Asia officers. *Id.* at 355, ¶ 60. Once again, Ng's promises were a lie. When he granted and when he later reaffirmed the option, Holdings and WCIL either did not intend to permit the option to be exercised or were recklessly indifferent to that fact. *Id.* at 360, ¶ 95; 364, ¶ 123.

During this same period, Ng and other Wharf officials requested UIHI's assistance through face-to-face meetings and other communications with UIHI in Colorado. *Id.* at 354, ¶ 57. In response, in reliance on the grant of the option and Ng's reaffirmations of UIHI's rights, and in performance of its obligations under the option agreement, UIHI continued to work in connection with the Franchise. *Id.* at 354-55, ¶ 58. UIHI employees even served as Cable's Chief Operating Officer and Chief Engineer. *Id.* at 355. Overall, UIHI devoted thousands of man-hours and approximately $1 million in out-of-pocket costs to these efforts. *Id.* at 355, ¶ 59.

3. The parties discuss but reject "activating" the TCA.

According to the TCA, upon license award Cable would have become obligated to pay UIHI a "Technical Assistance Fee" for UIHI's performance, after license award, of its duties *under the TCA* (*id.* at 50, 56, TCA cls. 2, 8.1), and to reimburse UIHI for expenses incurred *under the TCA*. *Id.* at 56, cl. 8.2. With the license awarded on June 1, the first installment of UIHI's fee would have been payable on June 30. *See id.* at 56, cl. 8.1. Yet, no dispute exists that Cable has never paid UIHI a dime, and that UIHI never provided services or demanded any payment under the TCA. *Id.* at 248, Schneider Affid. ¶ 5. No services were performed and no payments were made under the TCA because the TCA was *only* intended for use in connection with Cable's franchise application. *Id.* at 248, ¶¶ 4-5. Cable never proffered any contrary testimony.

In late 1993, recognizing that the TCA was inoperative, and in an attempt to bait Plaintiffs into abandoning their investment rights, Ng suggested that UIHI and Wharf agree to "activate" the TCA. *Id.* at 249, ¶ 6. Although Ng's proposal was rejected, he and Schneider exchanged several letters on the issue. *Id.* at 251-55. Ng's offer underscores the ongoing scheme to defraud Plaintiffs. As Ng wrote in a file memo:

> SN had dinner with Bill Elsner and Mark Schneider in Los Angeles on 1 Dec 93. . . . *Encouraged them to activate TCA (but they were careful not to take the bait).*

Id. at 259 (emphasis added).

Cable never attempted to rebut—either through an affidavit from Ng or otherwise—*any* of the evidence regarding the parties' intent in executing the TCA. Nor did

Cable ever explain why Ng referred to the TCA as "bait," or why he tried to induce Plaintiffs to "take the bait."

4. Holdings and WCIL refuse to permit UIHI to exercise its option to invest in CNCL.

In further reliance on the grant of the option, from late 1992 until late summer 1993, UIHI worked with Ng to finalize and document the terms under which UIHI would exercise its option and consummate its investment in CNCL. *Id.* at 356, ¶ 62. These terms were substantially similar to those which the parties had been discussing since the beginning of their relationship and regarding which there appeared to be no disagreement. *Id.* Throughout these discussions, Holdings and WCIL did nothing to suggest that they were anything other than fully committed to honoring the option. *Id.*

In August 1993, UIHI informed Ng that it was ready to exercise the option. *Id.* at 356, ¶ 64. However, rather than honor the option, Ng claimed that UIH's investment was subject to the approval of "his board," and would need to be delayed. *Id.* at 356, ¶ 65. This was the first time that Ng had ever claimed that "board approval" would be necessary for UIHI to invest. *Id.* at 357, ¶ 66.

Thanks in large part to UIHI's assistance, Cable launched its CATV services in November 1993. *Id.* at 357, ¶ 67. Finally, in early 1994, Schneider and Elsner traveled to Hong Kong to meet with Holdings' board. *Id.* at 357, ¶ 68. Shortly after that meeting, Holdings completely repudiated the option. *Id.* This litigation followed.

D. Correction of Misstatements in the Petition.

As the previous discussion demonstrates, Cable's petition seriously distorts the key facts underlying this case:

1. Given Cable's status as a defendant to only *one* of the eleven claims in this lawsuit, Cable's claim (p. 6) that "UIHI and Wharf Cable were the central players and the other parties simply affiliates" is fiction. The misconduct of Holdings and WCIL—*not* of Cable—and the right to invest in CNCL—not in *Cable*—are the focus of Plaintiffs' claims. Indeed,

> [w]hile there were early discussions concerning an investment in Wharf Cable, the parties eventually resolved, as they indicated at oral argument of this case, that the investment would be in . . . [CNCL].

(App. at 4a) Further, contrary to Cable's claim (p. 6), in addition to the allegations in the Amended Complaint the record contains other, uncontroverted evidence of the agreement with Holdings and WCIL concerning UIHI's investment rights (*see, e.g.*, 10th Cir. App. at 247, ¶ 5 (Schneider Affid.)), and showing that the object of the promised investment was CNCL (*see, e.g.*, *id.* at 418, 419-70 and 471-76).

2. Contrary to the petition (p. 2), this case is *not* a dispute over the "same technical services [that] were the subject of the [TCA]." Rather, it is a dispute over Holdings' and WCIL's ongoing misrepresentations and Plaintiffs' reliance—which included the provision of services—*prior to* license award, indeed beginning before the TCA was even drafted. (*See* pp. 5-11; 13, above.) The TCA only pertained to services *after* the June 1993 license award. (*See* pp. 9; 12, above.) Moreover, the record is uncontroverted that no services were ever provided under the TCA, which was never even activated. (*See* pp. 12, above.)

3. UIHI pleads an agreement with Holdings and WCIL under which UIHI or UIH Asia had the option to purchase an equity interest in *CNCL*. Contrary to the petition (pp. 3-4), UIH does *not* claim "any right or interest in Cable or in the CATV system arising out of [TCA] or the performance of . . . services [under the TCA]." Therefore, TCA cl. 7 (quoted at p. 3 of the petition) is irrelevant to this case.

4. Contrary to the petition (pp. 3-4), Plaintiffs do not claim "any additional or supplemental" agreement to the TCA. The complete text of the clause to which Cable alludes states: "Notice of termination, changes and additions to *this Agreement* as well as any additional or supplemental agreements to *this Agreement* must be made in writing. Additional oral agreements are invalid." 10th Cir. App. at 60, TCA cl. 14.8 (emphasis added). This provision means only that the TCA itself cannot be modified or supplemented through an oral agreement. No claim in this case attempts to modify or supplement the TCA.

On the contrary, UIHI's agreement with Holdings and WCIL has nothing to do with the TCA. Nothing in the TCA addresses agreements among UIHI, Holdings and WCIL. While the TCA could only be modified in writing, the record is uncontroverted that UIHI provided services *before and after* the date of the TCA but *before* license award, without any written agreement "modifying" or "supplementing" the TCA. This point only underscores that those services were *not* provided "in relation to" the TCA, but under UIHI's separate agreement with Holdings and WCIL.

REASONS FOR DENYING THE PETITION

Cable's petition should be denied. To compel arbitration of any of the claims in this case, the Tenth Circuit not only would have had to "rewrite" (App. at 10a) the arbitration clause on which Cable relies, but also the facts on which Plaintiffs' claims are based. The Tenth Circuit's refusal to do either was entirely unremarkable: The court analyzed the specific facts underlying those claims, applied the particular language of the TCA's arbitration clause to those facts, and determined that the facts giving rise to those claims do not fall within the scope of that arbitration clause. As the court held,

> notwithstanding the policy favoring broad interpretation of arbitration clauses, we simply cannot stretch the arbitration clause contained in the TCA to encompass the claims asserted in this litigation.

(App. at 8a)

The Tenth Circuit's unpublished opinion is specifically limited to the facts of this case, and "is not binding precedent." (App. at 1a) It acknowledges and adheres to precedent from this Court, and is consistent with the decisions of other Courts of Appeal. In sum, it raises no issue that would warrant this Court's review on certiorari.

A. The Tenth Circuit's Decision does not Suggest any "Split" among the Circuits Concerning Arbitration of Claims Involving Nonsignatories to an Arbitration Agreement.

Cable's claim (pp. 11-12) that the Tenth Circuit's opinion reflects a split among the Tenth and other circuits as to whether nonsignatories can be bound to arbitrate should be recognized as a contrivance to invite review of a decision that is limited to its particular facts.

Cable's arguments imply the existence of a categorical rule that claims involving nonsignatories are *always* arbitrable. This Court has never announced such a rule. Due to the enormous factual diversity of arbitration clauses and underlying disputes in particular cases, such a rule does not—*and cannot*—exist. As the Tenth Circuit recognized, "arbitration is a contractual matter, and parties may not be required to submit to arbitration claims which they have not contractually agreed to submit." (App. at 6a-7a, *citing AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986))

Consistent with this Court's decisions, the Tenth Circuit properly interprets and enforces those clauses which—unlike the clause on which Cable relies—evidence the parties' intent to require arbitration of the particular disputes presented. *See, e.g., Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995). Further, like other Courts of Appeal, the Tenth Circuit has held that in appropriate circumstances, a nonsignatory to an arbitration agreement may nonetheless enforce that agreement. *See O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 901 (10th Cir. 1992) (third-party beneficiary may enforce arbitration clause). The Tenth Circuit's opinion in this case neither alters the court's previous holding in *O'Connor*, nor purports to announce any sort of categorical rule concerning the arbitrability of claims involving nonsignatories.

Thus, *like all disputes over arbitrability*, whether a *particular* dispute involving nonsignatories is arbitrable turns on the specific language of the parties' arbitration agreement, the unique facts of their particular dispute, and the relationship of the nonsignatories who seek arbitration to the signatories and their dispute. Because of the fact-driven

nature of the inquiry, a diversity of outcomes among different courts in different cases construing different arbitration clauses is inevitable.

For example, in *Mitsubishi*, although counterclaim-defendant CISA was one of Mitsubishi's two parent corporations and was a party to the agreement which contained the arbitration clause, that clause expressly applied only to disputes between Soler and Mitsubishi. 473 U.S. at 617-19. "Because no arbitration agreement between Soler and CISA existed, the [district] court retained jurisdiction over [Soler's counterclaims against CISA]." *Id.* at 620 n.7.

Parties are free to limit the scope of an arbitration clause as they see fit. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989). Thus, the parties to the TCA *could have* drafted an arbitration clause to cover every conceivable dispute—whether related to the TCA *or any other agreement or matter* —that might have arisen between UIHI *or any of its affiliates and employees* and Cable *or any of its affiliates and employees*. However, as discussed at pp. 2-3 above, the TCA's arbitration clause is substantially narrower.

Applying the restrictive language in the TCA's arbitration clause to the facts of this case, the Tenth Circuit properly refused to "rewrite the TCA and its arbitration clause to encompass claims wholly unrelated to the TCA and involving parties who did not sign the TCA, and were never mentioned in that agreement." (App. at 10a) As with the counterclaims between Soler and CISA in *Mitsubishi*, the claims in this case fall outside the scope of the relevant arbitration clause. This case centers on claims against non-parties to the TCA. The TCA's arbitration clause applies *only*

to disputes "between the parties."[8] This case relates to a course of fraud that pre-dates the TCA and concerns UIHI's separate agreement with Holdings and WCIL. The TCA's arbitration clause applies *only* to disputes that relate to "this Agreement"—the TCA itself.

The Tenth Circuit's decision on the particular facts of this case—especially the limited arbitration clause—is consistent with the decisions of other Courts of Appeal that have construed similar arbitration clauses.[9] The four cases on which Cable relies in its petition—*J.J. Ryan, Sam Reisfeld, Arnold* and *Amoco Cadiz*— neither suggest a divergent line of authority, nor cast doubt on the Tenth Circuit's decision.

Contrary to the petition (pp. 8-9), none of these cases announces or applies a categorical rule concerning the arbitration of claims involving nonsignatories. None of these cases holds or implies that in order to further arbitration policy, a court should disregard the separateness between parent and subsidiary corporations and pierce the corporate veil. *Cf. ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1461 (10th Cir. 1995) ("Courts do not lightly pierce the corporate veil even in deference to the strong policy favoring arbitration.") (internal quotation omitted). Rather, each of

---

[8] The record contains no evidence that Holdings, WCIL or Ng were intended to be third-party beneficiaries of the TCA's arbitration clause, nor any other evidence that would allow Holdings, WCIL or Ng to enforce the TCA's arbitration clause under some contract or agency law principle. Likewise, Cable "provided no evidence that [it] should *not* be treated as a separate legal entity." (App. at 10a, n.4)

[9] *See, e.g., Taylor v. Investors Assoc., Inc.*, 29 F.3d 211 (5th Cir. 1994) (where arbitration clause limited to disputes between the parties, nonsignatories not entitled to arbitrate); *McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771 (2d Cir. 1992) (same); *Flink v. Carlson*, 856 F.2d 44 (8th Cir. 1988) (same); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111 (1st Cir. 1986) (same).

these cases turned on specific facts, which are materially different from those in this case.

First, none of Cable's cases construed an arbitration clause that was limited to disputes "between the parties."[10] Because, under *Mitsubishi*, disputes over arbitrability are resolved by determining what the parties specifically agreed to arbitrate (473 U.S. at 626), this distinction is fatal to Cable's "split of authority" argument.

For example, in *J.J. Ryan*—unlike this case—the parties had agreed to arbitrate "all disputes." 863 F.2d at 318. Applying this language, the court compelled arbitration of claims against the nonsignatory parent, which were factually identical to the arbitrable claims against the signatory affiliates. *Id.* at 320. Nothing in *J.J. Ryan* suggests that the court would have reached the same conclusion if the relevant arbitration clause—like the clause in the TCA—had been drafted to apply only to disputes "between the parties."

Second, this case is unlike *Amoco Cadiz*, where the signatory to an arbitration agreement tried to avoid arbitration by appointing a nonsignatory agent as a stand-in to bring claims *on the signatory's behalf*. 659 F.2d at 795-96.

---

[10]. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 318 (4th Cir. 1988) ("All disputes arising in connection with the present contract shall be finally settled. . . .by one or more arbitrators . . . . "); *Sam Reisfeld & Son Import Motor Co. v. S.A. Eteco*, 530 F.2d 679, 680 (5th Cir. 1976) (according to the court, the arbitration clause required "all disputes to be settled by arbitration. . . ."); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1271 (6th Cir. 1990) ("Any dispute arising under this Agreement shall be submitted to arbitration. . . ."); *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 791 (7th Cir. 1981) ("[A]ny difference arising out of this Agreement or the operations thereunder shall be referred to arbitration . . . .").

Here, Plaintiffs' claims are brought on their *own* behalf, *not* on behalf of another person who would be bound to arbitrate those claims if he had brought them himself.

In sum, Cable's "split of authority" does not exist. There is no categorical rule involving the universal arbitrability of claims against nonsignatories on which the Courts of Appeal need guidance. As the Tenth Circuit's decision demonstrates—*as well as the decisions on which Cable relies*—these disputes necessarily turn on their own unique facts. This Court's prior decisions regarding the contractual nature of the duty to arbitrate (*e.g.*, *Mitsubishi; AT&T; Volt*) provide adequate guidance to the lower courts as to how to resolve the myriad of possible arbitration clauses and fact patterns which those courts might analyze.

B. Based on Analysis of the *Facts* Underlying Plaintiffs' Claims—*Not* the Substantive Legal Theories—The Tenth Circuit Correctly Concluded That This Dispute Lacks The "Requisite Factual Connection to the [TCA]."

When it claims (pp. 12-13) that the Tenth Circuit's opinion diverges from other circuits' on whether and how to analyze the facts underlying a particular dispute, Cable offers another contrivance. Contrary to the petition, the Tenth Circuit's decision was *not* based on analysis of Plaintiffs' substantive legal theories. Rather, to determine whether the disputes in this case fall within the scope of the TCA's arbitration clause, the Tenth Circuit correctly focused on the factual allegations on which Plaintiffs' claims are based. (App. at 2a-10a) Nowhere did the Tenth Circuit's analysis hinge on differences between the various legal theories asserted.

As the Tenth Circuit stated, Plaintiffs' factual "allegations must 'touch matters' covered by the arbitration agreement in order to be subject to arbitration." (App. at 9a quoting *Mitsubishi*, 473 U.S. at 624 n.13) As the Tenth Circuit concluded, analysis of those factual allegations demonstrates that the disputes in this case fall outside the limited scope of the TCA's arbitration clause:

- "The vast majority of the claims are against defendants other than [Cable]" (App. at 10a): Plaintiffs assert eleven claims against Holdings and WCIL, and against Cable only *one, alternative* claim. Yet, neither Holdings nor WCIL are parties to the TCA or mentioned in that document.

- As the Tenth Circuit found, Plaintiffs' factual allegations "do *not* involve the performance by UIHI of technical services under the TCA." (App. at 9a) Rather, those allegations center on misrepresentations, in reliance on which UIHI began providing services in summer 1992 and continuing thereafter. The TCA, by contrast, could not have required UIHI to provide any services until June 1, 1993.

- Based on the separate, oral agreement reached among UIHI, Holdings and WCIL in October 1992, Plaintiffs claim an investment right in *CNCL*.[11] By contrast, Plaintiffs do not claim an investment right in *Cable* or pursuant to the TCA. Plaintiffs are not suing for breach, specific performance or rescission of the TCA, or any agreement between Plaintiffs and Cable. Nor do Plaintiffs assert any tort claim arising out of or related to the TCA.

---

[11] Cable, CNCL's subsidiary, would not even have had legal authority to grant that right. That authority necessarily resided in CNCL's parents, Holdings and WCIL.

By pointing to facial similarity between the services described in the TCA and those which UIHI performed in reliance on the misrepresentations and pursuant to its option agreement with Holdings and WCIL, Cable begs the question. The relevant inquiry is *not* whether UIHI's services were similar to those outlined in the TCA, but *why* UIHI provided those services: Did UIHI do so "in relation to" the TCA, or "in relation to" *something else*, such as an agreement with different parties or reliance on misrepresentations? As the Tenth Circuit noted:

> The mere fact that UIHI provided services to [Cable] of the same general type as were contemplated under the TCA, on its claimed expectation of receiving an ownership interest in [Cable's] parent, does not, by itself, provide the requisite factual connection to the [TCA].

(App. at 9a) (internal quotation omitted)

The TCA did *not* require *any* services from UIHI unless and until Cable won the Franchise license—an event that might *never* have occurred. Yet, the record is undisputed that UIHI provided services well before that date, beginning before the TCA was even drafted. The record is also undisputed that UIHI never provided *any* services, never requested payment, and never was paid, under the TCA. The TCA was never even activated.

By complaining (pp. 8; 15-16) that Plaintiffs have "avoid[ed] arbitration" through the framing of their claims and by asserting claims against defendants who did not sign the TCA (Holdings, WCIL and Ng) and on behalf of a plaintiff (UIH Asia) who did not sign the TCA, Cable begs the question of what this case is about. Cable's petition reduces to a lament that Plaintiffs should have brought a *different* lawsuit—a suit that focused on Cable, instead of

Holdings and WCIL; that alleged an investment right in Cable itself, rather than in CNCL; and that alleged an agreement with Cable which modified or extended the TCA, instead of a course of pre-TCA fraudulent conduct by Holdings and WCIL and a separate agreement with those entities concerning Plaintiffs' investment rights. However, just as the Tenth Circuit declined to rewrite the TCA's arbitration clause to expand its scope, Cable cannot rewrite the facts pleaded in the Amended Complaint to create an arbitrable dispute. Analysis of whether Plaintiffs' claims are arbitrable must be based on facts actually alleged, not on hypothetical facts that Cable wishes had been alleged.

Policy issues concerning international trade change none of this. Notwithstanding the policy favoring arbitration, the Federal Arbitration Act "does not confer a right to compel arbitration of any dispute at any time." *Volt Info. Sciences, Inc.*, 489 U.S. at 474. For this reason, "the policy favoring broad interpretation of arbitration clauses does not permit wholesale redrafting of such clauses" (App. at 10a) to transmute a non-arbitrable dispute into an arbitrable one.

CONCLUSION

For the foregoing reasons, Cable's petition should be denied.

Respectfully submitted,

JEFFREY A. CHASE
Jacobs Chase Frick
Kleinkopf & Kelley, LLC
1050 17th Street, Suite 1500
Denver, Colorado 80265
(303) 685-4800

DAVID B. WILSON
Counsel of Record
Holme Roberts & Owen LLC
1700 Lincoln, Suite 4100
Denver, Colorado 80203
(303) 861-7000

Counsel for Respondents

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Tenth Circuit Entered February 9, 1996

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation, and UIH ASIA INVESTMENT CO., a Colorado general partnership, Plaintiffs - Appellees, v. WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; WHARF CABLE LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen, Defendants - Appellants.	No. 95-1184 (D. Colorado) (D.C. No. CIV-94-N-2560)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **ANDERSON** and **McWILLIAMS**, Circuit Judges, and **HOLMES****, District Judge.

We must decide in this case whether an arbitration clause in a technical cooperation agreement mandates arbitration of a dispute between plaintiffs/appellees United International Holdings, Inc. (''UIHI'') and UIH Asia Investment Co. (''UIH Asia''), a Colorado general partnership of which UIHI is the majority owner managing partner, and defendants/appellants The Wharf (Holdings) Limited (''Wharf Holdings''), Wharf Communications Investments Limited (''Wharf Communications''), Wharf Cable Limited (''Wharf Cable''), and Stephen Ng, an officer in each of the defendant Wharf companies. The district court held it did not, and summarily denied defendant Wharf Cable's motion to compel arbitration. Defendants have filed a motion to expedite this appeal, which has been referred to this panel. A jury trial is set to commence in this case in the federal district court in Colorado on February 17, 1997. The Final Trial Preparation Conference is set for January 17, 1997. The motion to expedite this appeal is now moot. We affirm the district court's order denying Wharf Cable's motion to compel arbitration.

BACKGROUND

UIHI is a Delaware company based in Denver which provides technical services to cable television systems outside the United States. UIH Asia is a Colorado general partnership of which UIHI is the majority owner and managing partner.

In 1991, Wharf Holdings and its 100% owned subsidiary, Wharf Communications, both Hong Kong companies, explored the possibility of applying for a cable

---

** The Honorable Sven E. Holmes, United States District Court for the Northern District of Oklahoma, sitting by designation.

television franchise in Hong Kong. The deadline for submitting the franchise application to the Hong Kong government was September 30, 1992. From late 1991 through the fall of 1992, the Wharf companies and UIHI discussed the possibility of engaging in a cooperative venture between those companies and a subsidiary of NYNEX, one of the "Baby Bell" telephone companies. As the deadline for the submission of the application approached, and the parties were unable to agree on the terms of the venture, they entered into two separate Technical Cooperation Agreements, one between Wharf Cable and UIHI and one between Wharf Cable and NYNEX. The Technical Cooperation Agreement between Wharf Cable and UIHI ("TCA") is directly relevant to this case.

The TCA provided that, if Wharf Cable got the Hong Kong cable franchise, UIHI would provide a variety of technical services in exchange for quarterly fees. It further provided that written notice had to be given of "any additional or supplemental agreements to this Agreement" and that "[a]dditional oral agreements are invalid." Agreement ¶¶ 14.3, 14.8, 14.9, Appellants' App. Vol. II at 497-98. It also contained the following clauses relating to arbitration of disputes:

> 13.1 If any dispute, controversy or difference arises between the parties out of, or in relation to, this Agreement or for the breach thereof, the parties shall first attempt in good faith to resolve amicably such dispute, controversy or difference.
>
> 13.2 If such attempt is unsuccessful, such dispute, controversy, or difference shall be resolved by arbitration in [sic] or any other place agreed upon by the parties. Notwithstanding the first

> sentence, any disputes arising from, or in connection with this Agreement shall be arbitrated in Hong Kong. Such arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. . . .

Agreement ¶¶ 13.1, 13.2, *id.*, at 497. Most provisions of the TCA, but not the paragraph concerning arbitration, were "conditional" upon the award of the franchise. Agreement ¶ 2, *id.*, at 488.

Wharf Cable submitted its franchise application, including the TCA, on September 30, 1992, and was awarded the franchise by the Hong Kong government on June 1, 1993. Apparently, throughout their negotiations, UIHI had always expressed an interest in investing in the Wharf Cable project, thereby becoming an equity participant in the Hong Kong cable television venture.[1] While there were early discussions concerning an investment in Wharf Cable, the parties eventually resolved, as they indicated at oral argument of this case, that the investment would be through Wharf Cable's newly formed parent, Cable Network Communications Limited ("CNCL").[2] They were never, however, able to agree and reduce to a written agreement the terms of such an investment. A major disputed factual question in this case is whether the parties nonetheless entered into an oral contract concerning UIHI's acquisition of a 10% interest in CNCL.

---

1. UIHI and UIH Asia claim that they always seek an ownership interest in international cable television systems for which they provide technical assistance: "UIHI lends its unique expertise in international [cable television systems] *only* to cable projects in which it is an investor or in which it owns the right to invest." Appellees' Br. at 8. Thus, they assert that it was clear all along that an ownership interest by UIHI in a Wharf company was essential to the relationship.

2. The final structure of the Wharf group was as follows: Wharf Holdings was the 100% owner of Wharf Communications, which was the 100% owner of CNCL, which was the 100% owner of Wharf Cable.

When the Wharf group continued to refuse to permit UIHI's 10% investment, UIHI and UIH Asia filed a twelve-count complaint in the federal district court in Colorado, against Wharf Cable, Wharf Communications, Wharf Holdings, and Stephen Ng, claiming that they had breached an oral contract giving plaintiffs an option to purchase a 10% interest in CNCL, Wharf Cable's parent, in exchange for various services performed in connection with the development and implementation of the Hong Kong cable television franchise. Plaintiffs' averred in their complaint that, pursuant to this oral contract, they provided a variety of technical services, including designing cable and information systems, assisting with the negotiation of contracts, consulting on business strategies, and assisting with the hiring of employees and the arrangement of financing. UIHI apparently provided these services over a period of time, commencing before the franchise application was made and continuing beyond the time when the franchise was awarded. Among the claimed violations were violations of the federal and Colorado securities laws, breach of contract, breach of fiduciary duty, fraud and negligent misrepresentation, promissory estoppel, unjust enrichment, and civil conspiracy. Wharf Holdings and Wharf Communications are parties to all of these claims. Wharf Cable was a named defendant in four claims—promissory estoppel and unjust enrichment, brought alternatively to the breach of contract claim, and common law fraud and conspiracy. Stephen Ng was named in his individual capacity in five claims, including securities and common law fraud and promissory estoppel. At oral argument, plaintiffs stated that only one claim—for unjust enrichment, brought alternatively to their main claims—now remains against Wharf Cable.

Defendant Wharf Cable moved to compel arbitration under the arbitration clause of the TCA. The other Wharf

companies did not join in the motion. The district court denied the motion, and Wharf Cable brought this appeal, seeking interlocutory review pursuant to the Federal Arbitration Act, 9 U.S.C. § 16(a). The other Wharf defendants also initially appealed the district court's denial of their motion to dismiss plaintiffs' claims on forum non conveniens grounds. They have now voluntarily withdrawn the forum non conveniens issue from this appeal. *See* Appellants' Br. at 3 n.1.

DISCUSSION

"We review a district court's grant or denial of a motion to compel arbitration de novo, applying the same legal standard employed by the district court." *Armijo v. Prudential Ins. Co.*, Nos. 94-2131, 94-2132, 94-2257, 1995 WL 7438601, at *2 (10th Cir. Dec. 15, 1995); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1513 (10th Cir. 1995).

Under the Federal Arbitration Act (FAA), 9 U.S.C. § 3, a district court must stay judicial proceedings where a written agreement provides that the subject of the litigation must be submitted to arbitration. " 'There is a strong federal policy favoring arbitration for dispute resolution.' " *Coors Brewing Co.*, 51 F.3d at 1514 (quoting *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 465 (10th Cir. 1988)). This policy is "particularly strong in the context of international transactions." *Id.* If there is uncertainty as to whether a claim is arbitrable, "[a]ll 'doubts are to be resolved in favor of arbitrability.' " *Id.* (quoting *Oil, Chem., & Atomic Workers Int'l Union, Local 2-124 v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976)).

However, arbitration is a contractual matter, and parties may not be required to submit to arbitration claims which

they have not contractually agreed to submit. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986); *see Coors Brewing Co.*, 51 F.3d at 1516. Thus, as we stated in *Coors Brewing Co.*, only claims having "a reasonable factual connection to the contract" are arbitrable. *Id.; cf. Bridgestone/Firestone, Inc. v. Local Union No. 998*, 4 F.3d 918, 922 (10th Cir. 1993) (holding a dispute not subject to arbitration where there was "no way in which the arbitration clause . . . [could] be stretched to cover" the subject matter of the dispute). However, we have also held that a nonsignatory to an arbitration agreement may nonetheless enforce the agreement if he is a third party beneficiary. *O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 901 (10th Cir. 1992). "An intent to benefit the third party must be apparent from the construction of the contract in light of all surrounding circumstances to qualify that party as a third party beneficiary." *Id.*

Additionally, the Supreme Court has specifically held that courts may separate claims which are subject to arbitration from those which are not. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (observing that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *Coors Brewing Co.*, 51 F.3d at 1517 (noting that "the Supreme Court has held that litigation must proceed in a 'piecemeal' fashion if the parties intended that some matters, but not others, be arbitrated").

Appellant Wharf Cable argues that the broad language of the arbitration clause in the TCA, interpreted in light of the strong federal policy favoring arbitration, encompasses the dispute between the parties in this case, including any

allegations based upon the claimed oral contract involving the 10% investment in CNCL, because they "involve matters related to" the TCA—i.e., technical services to be provided for Wharf Cable by UIHI in exchange for some kind of compensation. They further argue that, even though only one of the two plaintiffs in this litigation (UIHI) and one of the four defendants (Wharf Cable) were signatories to the TCA, "UIHI and Wharf Cable were the central players and all other parties simply affiliates." Appellants' Br. at 27. They also argue that "basic principles of contract and agency law" mandate that all the named parties in the litigation are bound by the TCA.

Plaintiffs/appellees, UIHI and UIH Asia, respond that the TCA was signed only by Wharf Cable and UIHI, whereas the litigation in this case is "primarily" against Wharf Holdings and Wharf Communications, nonsignatories to the TCA. Appellees' Br. at 1. They also assert that plaintiffs/appellees' claims "arise from events that began before the alleged arbitration agreement was drafted, continued long after that 'agreement' even theoretically could have become operative, and did not conclude until after the parties rejected 'activating' that agreement." *Id.*

We hold that, notwithstanding the policy favoring broad interpretation of arbitration clauses, we simply cannot stretch the arbitration clause maintained in the TCA to encompass the claims asserted in this litigation. The claims are outside the scope of the TCA, and they are primarily against parent companies of Wharf Cable, not against Wharf Cable itself, the only signatory to the TCA. We therefore affirm the district court's denial of Wharf Cable's motion to compel arbitration.

The TCA was a specific agreement under which UIHI would provide a variety of technical services to Wharf Cable

upon its receipt of the Hong Kong cable television franchise. In exchange for these technical services, UIHI was to receive quarterly fees. The TCA specifically provided that the relationship of UIHI to Wharf Cable was that of an independent contractor and UIHI was to have "no right or interest" in Wharf Cable. Agreement ¶ 7, Appellants' App. Vol. II at 493-94. The arbitration clause covered disputes between the parties to the TCA (UIHI and Wharf Cable) arising out of or in relation to the TCA. The TCA contains no reference to Wharf Cable's parent companies.

The allegations in this litigation, by contrast, are by UIHI and its subsidiary, UIH Asia, against Wharf Cable, two of its parent companies, and an individual who was an officer in each Wharf company, and involve alleged fraud, misrepresentations, securities violations, contractual violations, breach of fiduciary duties, conspiracy, unjust enrichment, and promissory estoppel in connection with a claimed oral contract permitting plaintiffs to obtain an ownership interest in Wharf Cable's parent, CNCL. They do *not* involve the performance by UIHI of technical services under the TCA. The mere fact that UIHI provided services to Wharf Cable of the same general type as were contemplated under the TCA, on its claimed expectation of receiving an ownership interest in Wharf Cable's parent, does not, by itself, provide the requisite "factual connection to the contract." *Coors Brewing*, 51 F.3d at 1516.[3] The Supreme Court has said that allegations must "touch matters" covered by the arbitration agreement in order to be subject to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985). The array of

3. Furthermore, only Wharf Cable sought to compel arbitration of plaintiffs' claims. The other Wharf companies, non-signatories to the TCA, did not seek to compel arbitration. Repeated references to the other Wharf companies as "affiliates" does not change the fact that they neither signed, nor were referred to in, the TCA.

claims asserted against the Wharf group in this case are substantially different from claims relating to technical services provided under the TCA.

Moreover, the vast majority of the claims are against defendants *other* than Wharf Cable. At oral argument, Wharf Cable argued strenuously that it, Wharf Cable, was the key player throughout the entire relationship, even though it was a named defendant in only a few claims, and now is a named defendant in only one, and even though it is a subsidiary of other Wharf group companies. They relied in part on a letter dated November 5, 1993 addressed to Stephen Ng at Wharf Cable, and which referred to UIHI's relationship with Wharf Cable and the "Wharf Cable project." *See* Appellants' App. at 324-25. They overlook the fundamental point, however, that Wharf Cable was a separate legal entity from the other Wharf companies, and Wharf Cable alone, not its affiliates or parent companies, signed the TCA. *Cf. ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1461 (10th Cir. 1995) ("Courts do not lightly pierce the corporate veil 'even in deference to the strong policy favoring arbitration.' ") (quoting *Califano v. Shearson Lehman Bros., Inc.*, 690 F. Supp. 1354, 1355 (S.D.N.Y. 1988)).[4]

In sum, we will not, in effect, rewrite the TCA and its arbitration clause to encompass claims wholly unrelated to the TCA and involving parties who did not sign the TCA, and were never mentioned in that agreement. Those claims are too remote, in substance and in distance, from the TCA to compel their arbitration pursuant to that agreement. The policy favoring broad interpretation of arbitration clauses does not permit wholesale redrafting of such clauses.

4. The Wharf group has provided no evidence suggesting that Wharf Cable should *not* be treated as a separate legal entity.

For the foregoing reasons, the decision of the district court denying the motion to compel arbitration is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge